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The Examiner further asserts that claims 27 and 28 define the viscosity in a range and at "25 C" and it is not clear what the meaning is of "25 C". In response, claim 26 has amended to depend from claim 25 which provides proper antecedent basis and claim 27-28 have been amended to include the degree symbol.

**35 USC § 103**

The Examiner has rejected claims 1 - 11 and 25 - 29 under 35 U.S.C. 103(a) as being unpatentable over Rath et al. (US 5,972,322 of record), (US'322) in view of Rigg et al. (US 5,622,692 of record) (US'692) and Stewart (WO/98/30189).

The Examiner asserts that Rath teaches a method for providing customized cosmetic product, the method comprising preparing the cosmetic product by combining separate components that are selected by the customer. (see the abstract), where the separate components include a base composition, and some variable ingredients, such as thickener, enhancing additive. (See, particularly col. 4, line 17-56, col. 6, line 29 to col. 7, line 2, col. 8, lines 23-42 (thickening agents); and col. 5, lines 4-24, col. 7, lines 31-47, and col. 9, line 14 to col. 10, line 37 (enhancing additives), where each of the separated components may contain a preservative, a polyhydric alcohol or a fragrance. (col 12, lines 43-47), and where the separate components are combined and mixed to obtain a homogeneous mixture (col. 13, lines 52-63).

The Examiner further asserts that for a composition containing a solvent, a solubilizing agent and a preservative, see the conditioner base disclosed at col 5, line 44 to col. 6, line 8; for polyethylene glycol esters of fatty alcohols; and polysorbates as solubilizing agents see col. 5, lines 60-67; for the viscosity of the base compositions within the instantly claimed viscosity ranges see col. 3, lines 3-4, col 5, lines 36-37, and col. 7, lines 58-59; for DMDM hydration and

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polyaminocarboxylic acid chelates (EDTA), see col. 13, lines 45-58, 66-67, Examples 9, 13, 14 and tables 16-21 at col. 17-23; that the final composition may be prepared at a hair salon (a retail location) see col. 2, lines 34-36; that the composition is packaged in containers (col. 13, lines 31-34); that Rath also teaches various composition containing performance agents in varying amounts; see, col. 4, lines 28-30 and col. 9, lines 26 to col. 13, line 5; that varying the amounts of the active agents is considered equivalent to provide a plurality of intensity levels as herein claimed; and that several addition types of performance agent are disclosed. The Examiner admits that Rath does not teach expressly that the vehicles of each performance have at least two or three ingredients in common, a blank composition, a label identifying the components of the formulation, that the fragrance contain a solvent and at least one preservative in common, a label with code, a machine scannable bar code, the volume of the container, or the angle of the container's major axis during agitation but that it would have been *prima facie* obvious to a person of ordinary skill in the art, at the time the claimed invention was made, to employ the same vehicles (such as solvent, preservative, etc.) for each of the performance agents (e.g., thickener, fragrance), since Rath teaches that each of the composition may contain the same components such as water, alcohols and preservatives.

The Examiner asserts that Rigg et al. teaches providing a customized cosmetic composition in a container having a bar code label for identifying the customized composition, (see particularly col. 2, lines 55-67, col. 4, lines 16-63). The Examiner further asserts that Stewart teaches a system and a method of preparing a customized, point-of-sale cosmetic composition; that the method provide a base composition, and at least one of additives, each additive comprise a plurality of variants, and that commonly used additives include pH adjusters, oils, drying agents, anti-dandruff agents, salts colors, fragrance moisturizers, gloss agents, etc.; (see particularly the abstract, pages 22-25 and the claims).

The Examiner asserts that it is within the skill of artisan to add an inert solvent or diluents to a cosmetic composition to dilute the composition in order to achieve the desired strength or level of activity of the composition, that absent evidence of unexpected results, the addition of a blank composition having common ingredients with the performance agents is not considered critical that the volume of the container is not considered critical to the invention absent evidence to the contrary because it is within the skill of the artisan to select a container capable of holding an appropriate amount of composition, and that it is within the skill of artisan to adjust the angle of container during agitation to achieve the desired mixing, absent evidence to the contrary.

The Examiner asserts that it would have been *prima facie* obvious to one of ordinary skill in the art at the time of the invention to prepare the compositions of Rath using similar vehicles in a container with bar code label as taught by Rigg et al. with the reasonable expectation of obtaining compatibility of the separate components for specialized treatment compositions that can be identified for future use, and that it would also have been *prima facie* obvious to one of ordinary skill in the art at the time the invention was made to employ more than one variable performance agents, including fragrance, colors, or benefit agents such as vitamins, anti-dandruff agent, in a customized composition as suggested by Stewart.

The Examiner has rejected claims 23 and 24 under 35 U.S.C. 103(a) as being unpatentable over Rath et al. (US 5,972,322 of record), in view of Rigg et al. (US 5,622,692 of record) and Stewart (WO 98/30189), and in further view of Tartaglione (US 4,851,062 of record), asserting that Rath et al., Rigg et al., and Stewart teaches or suggests all the limitation of the claims as stated above but that they do not teach expressly a container with a neck, a plug inserted in the neck and a cap, or a container with a neck and a cap without an orifice.

The Examiner asserts, however, that Tartaglione teaches a container for packaging cosmetic composition that has a neck and a cap wherein the neck may be closed with a plug. See the abstract, column 1, lines 10-14, column 3, lines 39-41, 50-65 and column 4, lines 30-35 and that, therefore, it would have been *prima facie* obvious to one of ordinary skill in the art at the time the invention was made to provide the composition as suggested by Rath et al., Rigg et al., and Stewart in a container with a plug and a cap as taught by Tartaglione expecting to provide cosmetic compositions in containers with safety closures for preventing contamination of the contents. Applicants respectfully traverse these rejections.

Rath et al. relates to a system for combining disparate and separate components to form a customized hair care formulation where the thickener is separate from the product base and is separately added after other enhancing agent ingredients have been added (see, e.g., column 1, lines 33-40, 51-55 and line 65 to column 2, line 1). Rath et al. describes in all cases a low viscosity base which can be selected, a second package containing a compatible thickening composition, and where a wide variety of enhancing additives may be added. Rath et al. teaches away from the present invention where the base composition where appropriate already comprises a thickening agent (see page 5, lines 21-25). Moreover, previously amended claim 1 makes clear that the first and second class of performance agents are independently selected from fragrances, colorants, benefit agents, and blends thereof and are not thickening agents.

Furthermore, Rath et al. describes that the hair care system which includes a base, a thickener and separate enhancing additives are pre-packaged in the form of a kit (see col. 13, lines 24-27). By specifying multi-part product kits, Rath et al. teaches clearly that each of the component parts of the

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kit should be pre-selected by a person other than the consumer. The consumer is not intended to be involved in the packaging of the kits disclosed in Rath et al., but only in the possible mixing of the kit components. In contrast, in the present invention, the consumer selects, in any sequence, at least one personal care base composition, at least one variant from the first class of performance agents, and at least one variant from the second class of performance agents. Thus, in the present invention, the component parts of the product are not dictated by a pre-packaged kit selected according to the desire or whim of an unspecified person but by the precise needs of the consumer. The choice of components in the kits of Rath et al. will be limited, and as a result, the consumer may not be able to obtain the precise combination of components which they would like to have (see page 1, lines 22-28 in the instant specification).

Stewart teaches a computer controlled device for evaluating consumer test results and preferences (page 16, lines 10-20). The system includes a base composition and one or more additives that are added to the base (page 22, lines 4-6). Stewart discusses what the principal components of the additives are (page 23, lines 2-6) but is silent about how each additive relates to the other with respect to any ingredients that may be in common with each other. See also Examples 1-10 on pages 26-32 which discuss all the additional ingredients that can be added to the indicated cosmetic bases but are silent on how the ingredients in each additive relate to each other.

Rigg et al. discloses the method and apparatus for customizing facial foundation products. As in Stewart, Rigg et al. discloses a wide range of additives that may be added to a particular formulation (see col. 2, line 61-62). As in both Rath et al. and Stewart, there is no disclosure or suggestion regarding how the various additives relate to each other with respect to ingredients that may be in common with each other.

Applicants respectfully submit that Tartaglione does not remedy the deficiencies of Rath et al., Rigg et al., and Stewart with respect to the instant claims as amended.

In summary by the present amendments, claims 26-28 have been amended. Applicants submit no new matter has been added by these amendments.

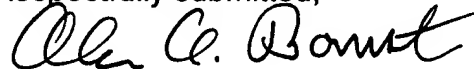
### **CONCLUSION**

In light of the above amendments and remarks, applicants submit that all claims now pending in the present application are in condition for allowance. Reconsideration and allowance of the application is respectfully requested.

If a telephone interview would facilitate prosecution of the application, the Examiner is invited to contact the undersigned at the number provided.

Attached hereto is a marked-up version of the changes made to the specification and claims by the current amendment. The attached page is captioned **"Version With Markings To Show Changes Made"**.

Respectfully submitted,



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Version With Markings To Show Changes Made

**IN THE CLAIMS:**

Claims 26-28 have been amended.

26. (Amended) The method of claim ~~4~~25 wherein said angle is greater than 30 degrees from the vertical.

27. (Amended) The method of claim 1 wherein said personal care product base has a viscosity in the range of about 0.9 to 100,000 cps at 25°C.

28. (Amended) The method of claim 1 wherein said product base's viscosity is in the range of about 0.9 to 30,000 cps at 25°C.